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No. (1)

In The
Supreme Court of the United States

In The Matter Of James Henry Stanley and
Dorothy Jean Wicker Stanley

KATHLEEN SUGGS,
PETITIONER
v.
JAMES HENRY STANLEY and
DOROTHY JEAN WICKER STANLEY,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1) Whether the policy set in *Williams v. USF&G*, 35 S.Ct. 289, 236 U.S. 549, 59 L.Ed. 713 (1915) along with subsequent case law that bankruptcy is for the "honest debtor", and the statutory law set in the Bankruptcy Code at 11 U.S. Code, Chapter 13, Sec. 1325 requiring "good faith", are applicable only to the debtor's conduct within the bankruptcy proceedings as held here in *In re Stanley*, 224 Fed. Appx. 343, 2007 WL 1026423 (C.A.5 La.).

2) Whether the Fifth Circuit in the matter of *In re Stanley*, 224 Fed. Appx. 343, 2007 WL 1026423 (C.A.5 La.) is correct (1) in allowing the bankruptcy court to deny res judicata, collateral estoppel, and comity to the record and findings of the Eighth Circuit in *Suggs v. Stanley and Hendricks*, 324 F.3d 672 (8th Cir. 2003) which established debtor's lack of credibility, as well as malice, motive and dishonesty towards the creditor, and (2) in allowing the bankruptcy court to require retrial of the major issue in the Eighth Circuit case, i.e., debtor's false accusation of murder, for personal gain.

3) Whether the Fifth Circuit is correct in limiting application of FRCP 52(a) and (c) to a review of only the evidence accepted by the bankruptcy court, thereby excluding from its review of the bankruptcy court's determination of debtor credibility and honesty, all of the evidence of debtor's dishonesty and false testimony before a federal court and jury in the underlying litigation.

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PETITION FOR WRIT OF CERTIORARI

Kathleen Suggs, petitioner and creditor of James and Dorothy Stanley in this Chapter 13 bankruptcy matter, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 29, 2007, in order to determine:

1) Whether application of the policy set in *Williams v. USF&G*, 35 S.Ct. 289, 236 U.S. 549, 59 L.Ed. 713 (1915) and subsequent case law that bankruptcy is for the honest debtor, along with the statutory law set in the Bankruptcy Code at 11 U.S. Code, Chapter 13, Sec. 1325 requiring good faith, is limited to conduct within proceedings before the bankruptcy court as was held here in the case of *In re Stanley*, 224 Fed. Appx. 343, 2007 WL 1026423 (C.A.5 La.).

2) Whether the Fifth Circuit in the matter of *In re Stanley*, 224 Fed. App.. 343, 2007 WL 1026423 (C.A.5 La.) is correct (1) in allowing the bankruptcy court in a Chapter 13 proceeding to deny res judicata, collateral estoppel, and comity to the record and findings of the Court of Appeals for the Eighth Circuit in *Suggs v. Stanley and Hendricks*, 324 F.3d 672 (8th Cir. 2003) which presented evidence of the debtor's malice, motive, and dishonesty towards creditor and included repeated instances of in-court false testimony by the debtor, and (2) in allowing the bankruptcy court to require retrial of the major issue in the Eighth Circuit case, i.e., debtor's malicious accusation of murder, thereby obtaining a different

result.

3) Whether the Fifth Circuit is correct in limiting application of FRCP 52(a) and (c) to a review of evidence accepted by the bankruptcy court, thereby excluding from its review of the bankruptcy court's determination of debtor credibility, all of the evidence of pre-petition dishonesty and malice towards creditor including debtor's false testimony while under oath in related litigation.

The Supreme Court is squarely presented with a holding by the Circuit Court of Appeals for the Fifth Circuit that in a Chapter 13 proceeding, the bankruptcy court may limit the requirements and the evidence of honesty and good faith to the debtor's conduct within bankruptcy proceedings, and may deny res judicata, collateral estoppel, and comity to the opinion and record from another circuit court as evidence of the debtor's lack of credibility, the debtor's dishonesty, and the debtor's malice aimed at the primary creditor.

The approach to the requirements of honesty and good faith by the bankruptcy court and then by the Fifth Circuit is contrary to both the policy surrounding the Bankruptcy Code and the letter of the law as well. Blatant dishonesty by a debtor is not only an offense against the other party, it is an offense against the courts. The bankruptcy court's decision was clearly erroneous as correctly found by the district court. The decision by the Fifth Circuit should be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit,, reversing the district court, is dated March 29, 2007, and is not published in the Federal Reporter, but is published at *In re Stanley*, 224 Fed. Appx. 343, 2007 WL 1026423 (C.A.5 La.). (A2) The opinion of Judge S. Maurice Hicks, United States District Court for the Western District of Louisiana, Shreveport Division, reversing the bankruptcy court, is dated December 5, 2005 and is unreported. (A15) The two orders of Judge Stephen Callaway, United States Bankruptcy Court, Western Division of Louisiana, Shreveport Division, consolidated on appeal, are not reported. (A44)

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 29, 2007. A Petition for Rehearing En Banc, treated as a Petition for Panel Rehearing, was timely filed, and was denied on September 10, 2007. Petition For Rehearing En Banc was denied on September 10, 2007. (A14) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

RELEVANT PROVISIONS INVOLVED

A petition and plan were filed on April 15, 2003 under the Bankruptcy Code, 11 U.S. Code, Chapter 13, Sec. 1325, which states in pertinent part:

Sec. 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the

court shall confirm a plan if···

> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title.
> (3) the plan has been proposed in good faith and not by any means forbidden by law. (Emphasis added.)

FRCP 52 sets the procedure for appellate review of factual findings from trial courts and in pertinent part states:

> (a) Effect. In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. ...(Emphasis added.)
> (c) Judgment on partial findings. If during a trial without a jury a party has been fully heard with respect to an issue.... (Emphasis added.)

STATEMENT

The Judgment Underlying The Creditor's Claim.

The essential facts are also summarized in the opinion of the Court of Appeals for the Eighth Circuit in *Suggs v. Stanley and Hendricks*, 324 F.3d 672 (8th Cir. 2003).

Dorothy Stanley, a resident of Shreveport, Louisiana, had a history of being very angry at her

brother, Gilbert Wicker. In 1986 he developed kidney failure and faced the need for a transplant. He asked his two sisters to consider being donors. They refused and cut off communications with their brother. After two cadaver transplants that eventually failed and ended in pancreatitous, a very painful condition, Gilbert ended his life in July of 1999. He lived in Arkansas at the time.

Three months prior to his death Dorothy had sued Gilbert in Arkansas' Chancery Court claiming that Gilbert and their mother's physician had doped their mother in order to get the mother's property transferred to Gilbert. Upon his death Dorothy's anger turned to Kathleen Suggs who she knew had inherited his property and as his administrator, would be in charge of his affairs, including defending Stanley's lawsuit against him, now against his estate.

Within minutes of learning of her brother's death, Stanley was on her way to Arkansas. During the trip to Little Rock she called the Little Rock Police Department and falsely reported a burglary in progress at her brother's home even though she knew that Suggs was lawfully on the premises and accompanied by Gilbert's attorney. (R103) Over the next several weeks she called and visited and wrote to authorities in Arkansas, accusing Suggs of serious crimes and suggesting that Suggs murdered Gilbert. At no time during all of those contacts did she ever mention her lawsuit against her brother, then against his estate, or that her brother was grievously ill at the time of his death (R40-41)

When it was time for Suggs, as administrator of Gilbert's estate, to obtain a copy of his death

certificate, she was unable to do so and was referred to the homicide detectives with the Little Rock Police Department. It was at that time she learned of Stanley's accusations.

After three days of testimony, Stanley lost the chancery court action she had brought against her brother before his death and which she had continued against his estate. (R85-90) During that trial it was disclosed that she had testified in a deposition that she had never said anything bad about Kathleen Suggs to anyone. This testimony occurred two months after she had accused Suggs of murder with the police and other authorities in Arkansas. (R26-29)

On March 15, 2000, Suggs sued Stanley in U.S. District Court in Arkansas for defamation. On February 14, 2001, she obtained a verdict of $50,000.00 which included punitive damages for malice. Within two weeks of the verdict Dorothy Stanley quit her job and has not been employed outside the home since. Stanley appealed the judgment to the Eighth Circuit Court Of Appeals which upheld the jury's verdict and stated that Dorothy Stanley's defamation of Suggs included a suggestion of "murder" and was "motivated by spite and desire for personal gain."

The Bankruptcy Case Proceedings.

On April 15, 2003, the same day Suggs' judgment became final, Stanley and her husband filed for Chapter 13 bankruptcy. (R25) Suggs objected to the petition and plan on the grounds that it was not filed in good faith as required by the bankruptcy code.

Discovery

Discovery of the Stanley's financial records became a mockery. During three hearings on discovery beginning in June of 2003, requests for items which would show where their money came from, such as loan applications, and where their money went, such as check registers, were fruitless. (R199) Stanley for five months claimed that she did not possess the requested records because she had discarded their check registers and that she was never provided with copies of loan applications. She maintained this posture until a hearing on October 7, 2003, ten days before trial, when for the first time she claimed that the reason she could not produce her records was because she had put them on her computer. (R199) She was then ordered to supplement responses to interrogatories, whereupon, less than a week before trial, she claimed her computer had crashed. (R192)

Bankruptcy Trial

Trial of the issues was held on October 17, 2003. More than once during the proceedings the bankruptcy court advised counsel that the issue was whether or not the Stanleys came to bankruptcy court with clean hands, not whether their hands were dirty beforehand. (R292-293) Suggs contended that the dishonesty and malice of Stanley and the determination of Stanley not to pay any of Suggs' judgment, no matter what, permeated the bankruptcy petition and plan.

The primary circumstance put forth was the motive, dishonesty, and malice established by the defamation lawsuit and how that behavior continued into the bankruptcy and was in fact a part of the

bankruptcy. This circumstance presented a number of occasions where Stanley gave false testimony while under oath. The same motive, dishonesty, and malice were evidenced in bankruptcy by a number of the types of circumstances which must be considered by bankruptcy courts in applying the "totality of circumstances" rule set by the Fifth Circuit in such cases as *In re Chaffin*, 816 F.2d 1070 (5th Cir. 05/19/1987) and the second *Chaffin* opinion at *In re Chaffin*, 836 F.2d 215 (5th Cir. 01/25/1988) where good faith, as set out in 11 U.S.C. Sec. 1325(a)(3), is brought into question.

The first questions to Dorothy Stanley by Suggs' counsel attempted to show briefly the relationship between the defamation case and the Chapter 13 case. Stanley had made false statements against Suggs before and during the defamation trial. (R26) When Suggs' counsel directed Stanley's attention to the opinion of the Eighth Circuit and that court's statement that Stanley had suggested Suggs was guilty of murder, Stanley's counsel objected on the grounds of relevancy and asked the court to retry whether a letter Stanley had written to homicide detectives had accused Suggs of murder. (R30) The court instructed Suggs' counsel to comply. Suggs' counsel said he did not want to retry the interpretation of the evidence. (R30-31) Suggs' counsel advised the court that he would offer the entire record of the defamation lawsuit. (R31-32) The court stated that the record would not be received into evidence because the court would have to read it but that counsel could "pull out" some of it and try to get it into evidence. (R32)

The court then vacillated between an insistence

that Suggs' counsel could only "pull out" some of the evidence from the defamation suit and question Stanley about those occasions versus statements by the court that it would not retry the defamation lawsuit. (R32) This procedure chosen by the court forced a retrial of each such event offered, with the event being taken out of the context of the record of the defamation case.

Several attempts to pull out information from the defamation record were made and the results are illustrated hereinafter. When the defamation record was formally proffered (R234), the bankruptcy judge stated that he would not consider the documents in making a decision in the matter. (R246-249)

Bankruptcy Court's Decision

At the end of the trial the bankruptcy court overruled Suggs' objections to confirmation of the original plan and petition, denied Suggs' motion to convert to Chapter 7, and entered an order to that effect on October 17, 2003. (A44) Also on that date the bankruptcy court allowed the debtors 15 days to modify the plan to remove a proposed retirement payment from the plan due to Suggs' objection, not the trustee's objection as the court noted in its order. (R144-148) The plan was modified on the fifteenth day and the court entered an order approving the plan on Dec. 2, 2003. (A45) Because an appeal in bankruptcy must be filed in ten (10) days and to avoid any claim of waiver, Suggs had to file two appeals. Both bankruptcy orders were timely appealed to the District Court of the Western District of Louisiana which consolidated the two appeals.

The bankruptcy plan was stayed prior to beginning payments to unsecured creditors.

District Court's Decision

The district court entered its Memorandum Ruling and Order (A15) on December 28, 2005, holding that the bankruptcy court's finding of "good faith" was clearly erroneous because the debtors "are not 'honest but unfortunate' debtors that the Bankruptcy Code is intended to protect." (A29) The district court specifically held that the bankruptcy court failed to consider pre-petition conduct as part of the totality of circumstances when considering the bad faith issue. (A30-33) Further, the court observed: "And while Chapter 13 bankruptcy relief is intended to afford honest debtors the opportunity for a fresh start, it is not intended to reward dishonest debtors or to allow debtors to carry out a dishonest scheme." (A33) The district court reversed and remanded with instructions to consider the entire record, including the pre-petition conduct of the debtors. The Stanleys filed a timely appeal to the Court Of Appeals for the Fifth Circuit and Kathleen Suggs cross appealed contending that the case is loaded with dishonesty and bad faith and therefore should be dismissed for its violation of the underlying purpose, policy and spirit of the bankruptcy code.

Fifth Circuit's Decision

On March 29, 2007, the Fifth Circuit reversed the decision by the district court and held that the finding of the bankruptcy court re the credibility of the debtors was "plausible". (A2) No mention was made in the court's opinion of the pre-petition false testimony of Dorothy Stanley, to any dishonesty on the part of the Stanleys, or to the proffered records from the Eighth Circuit.

REASONS FOR GRANTING THE PETITION

Reason I. Bankruptcy Law Specifically Demands Honesty And Good Faith.

In all of this it should not go unnoticed: False testimony is not just an offense against the other party; it is an offense against the courts.

a) The honesty and good faith of debtors in bankruptcy is demanded both by policy and by letter of the law.

In the law, for the most part, honesty is justifiably expected. In bankruptcy, because of the tremendous powers of bankruptcy courts, it must be demanded.

In the case of *Williams v. USF&G*, 35 S.Ct. 289, 236 U.S. 549, 59 L. Ed. 713 (1915), the Supreme Court held that the purpose of the Bankruptcy Act is to relieve "the honest debtor" from the weight of oppressive indebtedness. While the arguments over the requirement of good faith are sometimes confusing, for decades the courts have uniformly held that in view of the provisions within the Code such as 11 U.S.C., Secs. 1307(c) and 1325(a)(3), good faith is definitely a requirement in Chapter 13 cases. There is, in fact, much case law which holds that good faith is a requirement across the board in bankruptcy cases, not just in Chapter 13. See *In re Little Creek Development Co.*, 779 F.2d 1068 (1986) wherein the Fifth Circuit said:

> Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings. See *In re Victory*

Constr. Co., 9 Bankr. 549, 551-60(Bankr.C.D. Cal. 1981) (containing an excellent historical survey).

A debtor's motives such as spite and malice go to the very heart of the honesty and good faith issues. In light of Rule 404 and Rule 608 of the Federal Rules of Evidence, the debtor's false allegations, false testimony, and malice against the creditor are wholly admissible because such conduct pertains to the debtor's credibility. For a bankruptcy court to isolate and disregard evidence of the debtor's pre-filing conduct against the primary creditor, which so clearly signals a lack of credibility, goes well beyond abuse of discretion and constitutes clear error.

b) Pre-petition malicious conduct against a creditor is highly relevant to the requirements of honesty and good faith and may lead to clear error when the petition and plan are confirmed in spite of it.

Recently, the Supreme Court noted in the case of *Marrama v. Citizens Bank of Massachusetts*, 127 S.C. 1105 (U.S.02/21/2007) that in a Chapter 13 case, "...the federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a Chapter 13 case."

In the Eighth Circuit case of *In re Lemaire*, 898 F.2d 1346, (8th Cir. 03/26/1990), the court, sitting en banc, said:

> While pre-filing conduct is not determinative of the good faith issue, it is nevertheless relevant. See In re Doersam, 849 F.2d 237, 239 (6th Cir. 1988); Smith, 848 F.2d at 818; Neufeld, 794 F.2d at 152. When we consider

> the pre-filing conduct here, including the maliciousness of the injury which LeMaire inflicted upon Handeen, in light of the lack of "other factors" sufficient to establish good faith, we are persuaded that the bankruptcy court clearly erred in finding that LeMaire proposed his plan in good faith.

Obviously, all of the above is in line with the Congressional determination and the Supreme Court's application of the underlying purpose, policy, and spirit of the Bankruptcy Code, which is to discharge only the honest debtor from his debts. While policy may or may not have led the way, the letter of the law leaves no room for argument. Accordingly, it seems elementary that when there is considerable evidence that a debtor's behavior before, within, and following a petition and plan is dishonest, the entire record of such relevant behavior must be considered.

REASON II. The Wrong Approach To The Evidence From The Defamation Case.

It is apparent that the Fifth Circuit incorporated into its ruling an error by the bankruptcy court regarding the application of malice by way of collateral estoppel in this Chapter 13 case versus malice as it applies to nondischargeability in Chapter 7 cases. The bankruptcy court, because there was the mention of malice in this Chapter 13 case, approached the collateral estoppel question presented by the defamation judgment as though malice is an issue reserved for the

nondischargeability testing of Chapter 7, therefore, no significance should be given to the findings in the defamation case. That is a misconception of the issues and the evidence.

Suggs was trying to show dishonesty and bad faith in the bankruptcy case by offering into evidence the defamation opinion and trial record which presented a great deal of dishonesty by Dorothy Stanley. Although we believe the facts of that malicious defamation case do prove malice sufficient for nondischargeability purposes, the more important consideration at that point was the issue of dishonesty, particularly false accusations of murder for pecuniary purposes as clearly established by the Eighth Circuit's opinion.

The perspective of the bankruptcy court is reflected in its announcement of its ruling where the court stated that Suggs could not succeed with her allegation that the debtors had filed in Chapter 13 to avoid the nondischargeability problem in Chapter 7 until she first proved nondischargeability; and that the court would not be faced with that situation unless Suggs succeeded in converting the case to a Chapter 7. Clearly, a Catch 22. (R297-299) (A40) This approach by the bankruptcy court is illustrated hereinafter in the sections entitled Reason III and Reason IV of this petition.

The Fifth Circuit followed suit somewhat by holding that even if Suggs forced the case into Chapter 7, she could not prove nondischargeability because a jury instruction in the defamation suit would have allowed the Arkansas jury to find malice based on reckless disregard rather than intentional conduct. (A9) The error in that view is this: Should

the bankruptcy court in a Chapter 7 deny res judicata and collateral estoppel to the defamation judgment and force a trial of the issue for nondischargeability purposes, the result in Chapter 7 would depend on the actual facts in the defamation case, not upon a jury instruction. See *Brown v. Felsen*, 99 S.Ct. 2205, 442 U.S. 127 (U.S.06/04/1979).

Moreover, this stance by the bankruptcy court and then by the Fifth Circuit is contrary to the concept of bad faith based upon the debtor's motive in avoiding Chapter 7. For instance the Bankruptcy Appellate Panel for the Eighth Circuit in *Banks v. Vandiver*, No. 99-6079 (8th Cir. 5/31/2000) said that the bad faith of the debtor which was signaled by his filing in Chapter 13 to avoid 7 was inferred from the "potential" nondischargeability and whether or not the creditor had "...at least a colorable claim for nondischargeability." That is the circumstance argued by Suggs here.

In truth, the issue turns upon the debtor's *reasons* or what the debtor was thinking when he chose Chapter 13 over Chapter 7. Here, the Stanleys had been in Chapter 7 once before and there is no doubt that the Stanleys were conscious of the nondischargeability issue in Chapter 7. (R135) Furthermore, they were fully aware that the judgment and claim of Kathleen Suggs are based upon malicious defamation, one of the most personal of torts with the obvious purpose of doing harm to the victim. This had to be foremost in the Stanleys' planning. It was, after all, the reason for the bankruptcy.

REASON III. The Divided Decisions Of The Courts: An Entirely Different Result When The Whole Record Of Evidence Is Considered.

a) The bankruptcy court's wall of separation between pre-filing dishonesty and bankruptcy proceedings precluded the proper determination of witness credibility.

> THE COURT:
> Now, you are asking me to make a determination that they are in bad faith as of April 15, 2003 because of what Mrs. Stanley did in 1999. ...
> MR. NASH: Okay. The issue before the bankruptcy court today, as I understand it, is that the petition of bankruptcy and the plan were filed in bad faith. Our objection is based upon the history of this case since 1999 -- Let me. Please.
> THE COURT: No. When you say the history of this case. The history of this case began April 15, 2003. (R241)
> THE COURT: The history of your claim would be the correct statement.
> MR. NASH: ... We are depending on the judgment res judicata, collateral estopped and all of that, to show that this issue of malice was decided of course, and that's the basis for the money judgment. At this point, this evidence of this transcript and the history of the case, the animosity and the malice, the transcript shows that and it's a part of our basic case. That's why I offer it to the Court. I understand the Court is not

going to read it, but I would like to make my record now, offer it, Judge. (R242)
THE COURT: You may proffer. . . I am not considering those documents when I make my ruling.(R243)

In sum, the pre-petition conduct was treated merely as the basis of a claim for a debt owing. The contention and the evidence that the petition and plan were filed as a continuation of the malice and dishonesty of Dorothy Stanley against Kathleen Suggs, evidencing a very concerted determination not to pay, were totally rejected by the bankruptcy court. When announcing its decision, the court summarized its treatment of the pre-petition conduct as follows:

THE COURT:
I understand how this, in effect, as she testified, is a continuation in her mind, of the malice against her and of the injury. I do understand that, and I do not make light of that. But that's not the matter before this court. The matter before this court is whether or not Mr. and Mrs. Stanley may avail themselves of the statutory relief of the bankruptcy laws under Chapter 13 of Title 11 of the United States Code. (Emphasis added.) (R292)

* * *

I have to make sure that first Mr. and Mrs. Stanley come to this court with clean hands. Now that does not mean that their hands cannot have been dirtied before they came to this court; it just means they have to come into

> this court with clean hands. They have to come in here in good faith. (R293)

The court's ruling, which runs over thirty pages in the transcript, does not mention dishonesty or determination not to pay which had been the main thrust of Suggs' entire effort. At page A33 of the Appendix hereto, Suggs lists each reference to the underlying litigation within the ruling announced by the bankruptcy court. There is no mention of pre-filing dishonesty in any way. Even in discussing the debtors' conduct within bankruptcy proceedings, the admitted evidence, the court never uses such words as "honesty" or "dishonesty" or the terms "false testimony" or "lying under oath." None of such evidence was given any bearing whatsoever on the credibility of the Stanleys. In fact, not even the word "credibility" is ever mentioned.

Finally, as further evidence that the bankruptcy court sealed off the pre-petition conduct from the bankruptcy proceedings, we would point to the court's questioning of Kathleen Suggs at the very last of the trial on October 17, 2003 where the court asked her if the Stanleys had done anything to her since filing the bankruptcy, i.e., within the bankruptcy proceedings. This came during an offer of proof by the Stanleys and was not supposed to be used by the court in deciding the case. (R255, 261)

Nevertheless, at the follow-up proceeding on December 2, 2003, the bankruptcy court made the statement that one reason he was again ruling for the debtors was because when he had asked Suggs on October 17th if the Stanleys had done anything to her lately, she could only say, "this bankruptcy."

(BK transcript for Dec. 2, 2003) Again, the bankruptcy court limited the requirements of honesty and good faith to the court's view of the debtors' behavior within bankruptcy proceedings. Unquestionably, Suggs' answer of "this bankruptcy" to the court's question was exactly the right answer.

b) The district court did review the entire record as required by FRCP 52(a) and (c).

The district court specifically noted that the bankruptcy court failed to consider the pre-filing conduct which was a part of the entire record. Clearly, the district court reviewed the entire record as required by FRCP 52(a) and (c). This included the pre-filing conduct. Concepts such as honesty and dishonesty were openly discussed by the district court before determining that the Stanleys "are not 'honest but unfortunate' debtors that the Bankruptcy Code is intended to protect." (A29)

In particular, the district court held that the pre-filing conduct in the Arkansas lawsuit "is not only a fact germane to the Stanleys' bankruptcy, but is also one of the circumstances surrounding the Stanleys' Chapter 13 filing" and that the bankruptcy court had not considered that circumstance as a part of the whole. (A33) Further, the bankruptcy court had "isolated" each of the several circumstances that took place within the bankruptcy proceedings, never treating any two of them together. (A27) In other words, the bankruptcy court had taken each circumstance out of the box, examined it, announced, "this item standing alone does not constitute bad faith", and then returned it to the box, never seeing the "totality" of all the pieces of the puzzle taken

together.

Of considerable significance, when reviewing the problems within the bankruptcy proceedings, the district court made the following observation about how the refusals of discovery were treated by the bankruptcy court:

> Suggs contends that the Stanleys' refusals, denials, and duplicity in failing to provide financial documents is also evidence of bad faith. See Record Document 16 at 30. The bankruptcy court again discounted this argument and obviously found Dorothy Stanley's testimony that she routinely destroyed tax documents, that she had stopped keeping paper records and had begun storing information on the computer, and that her computer's hard drive failed, to be credible. See transcript at 307, 308. The bankruptcy judge also stated that he was satisfied as to the Stanleys reasons for not producing other financial documents to Suggs. See id. at 309. (A25)

In view of the district court's findings as to the debtors' lack of honesty, there is more than the apparent suggestion of skepticism here. The above brief description of the mockery made of discovery by the Stanleys has to be coupled with an undisclosed loan application the Stanleys made six weeks before bankruptcy with misinformation on the face of it. Obviously, that is why the Stanleys did not want to make any reference to that loan application during discovery. That circumstance is discussed more fully herein under *Reason V. Examples Of Bad Faith And Dishonesty Within Bankruptcy Proceedings.*

The case law surrounding Rule 52(a) and (c) requires consideration of the entire record. The totality of circumstances standard for determining good faith by a bankruptcy court should require no less than a consideration of the entire record, otherwise the application of the rule of law in such instances would be inconsistent. To isolate, exclude, and disregard a history of false testimony in the courtroom, particularly when it occurred in the litigation underlying a creditor's claim, is to guarantee a false reading of any debtor's credibility.

c) The Fifth Circuit did not review the entire record as required by FRCP 52(a) and (c).

Rather it looked for any evidence to support the bankruptcy court's judgment. That is not the proper test. Moreover, the circuit court adopted a Catch 22 set by the bankruptcy court regarding the application of malice by way of collateral estoppel in this Chapter 13 case versus malice as it applies to nondischargeability in Chapter 7 cases.

The most notable aspect of the opinion of the Fifth Circuit is that there is no discussion of the debtors' dishonesty even though this was a primary reason the district court reversed the bankruptcy court and it was the central issue in Suggs' cross appeal. A reading of the entire opinion reveals no reference to the pre-filing conduct. Instead, the Fifth Circuit concentrated its attention on any substantial evidence to support the bankruptcy court's judgment. That is not the proper test. Rule 52(a) and (c) requires a review of the entire record to see if a mistake has been committed.

The circuit court centers on the bankruptcy

court's treatment of four of the circumstances Suggs presented within the bankruptcy proceedings and states that, "These determinations are, after all, based largely on the trial court's credibility calls, to which we (and the district court sitting as an appellate court) owe considerable deference." The court then cites *In re Acosta*, 406 F.3d 367, 372 (5th Cir. 2005) and adds that if such determinations by the bankruptcy court are "plausible in light of the record viewed as a whole" then the appellate court cannot reverse. (A10)

One has to ask, how could the record have been viewed as a "whole", particularly as to credibility, without a discussion of the extensive evidence of false testimony or even the mention of dishonesty, the main issue on appeal?

Moreover, the way in which the *Acosta* decision is used here seems in conflict with the Supreme Court's holding that "A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed." U. S. v. U. S. Gypsum Co., 333 U.S. 364, 395, 92 L.Ed. 746, 68 S.Ct. 525 (1948). (Emphasis added.); Westbrook v. Comm. Internal Rev., 68 F.3d 868 (1995). Certainly, if there is "enough evidence" to support a trial court's factual findings, then logically, such findings would literally have to be "plausible" and "permissible". Yet, at the same time, the Supreme Court said in *U.S. Gypsum Co.* that a finding with enough evidence to support it may still be clearly erroneous and subject to being set aside.

Clearly, the apparent contradiction disappears if a determination of what is "plausible" is always

based upon the entire record and not upon just the evidence the trial court accepted. Accordingly, where Rule 52 is involved, the much more important consideration is not whether a factual determination has enough evidence to support it, as we believe the circuit court looked for here, but rather, upon considering the entire record accurately, whether or not the trial court has clearly erred and a mistake has been committed.

Reason IV. Examples Of The Debtors' Pre-filing Dishonesty And Bad Faith.

The bankruptcy court rejected the record of the underlying trial in U.S. District Court in Arkansas, and the findings within the opinion of the Eighth Circuit Court of Appeals affirming that judgment. The bankruptcy court then required re-adjudication of any instance of Debtor's dishonest conduct during that trial. What follows are examples of the bankruptcy court's procedure for such instances.

1) Dorothy Stanley's false testimony that she had never accused Kathleen Suggs of serious crimes.

At the very first of the trial in bankruptcy court on October 17, 2003, counsel for Kathleen Suggs sought to refer to the opinion of the Eighth Circuit and to offer the record which proved dishonesty and malice and included numerous instances involving false testimony by Dorothy Stanley. It would have shortened the trial in bankruptcy court by several hours. Nevertheless, counsel was not even allowed to reference the specific use of the term "murder" announced in the findings by the U.S. District Court

in Arkansas, and repeated specifically in the opinion of the Eighth Circuit.

Again, the first questions to Dorothy Stanley by Suggs' counsel attempted to show briefly the relationship between the defamation case and the Chapter 13 case. Stanley had made false statements against Suggs before and during the defamation trial. (R26) During the bankruptcy trial, when several questions were asked of Stanley about her accusations against Suggs she denied accusing Suggs of any wrongdoing. When Stanley was asked if she had written a letter to the Little Rock Police Department suggesting Suggs was guilty of murder, Stanley admitted writing the letter but again claimed she had not accused Suggs of any wrongdoing. (R29) When Suggs' counsel directed Stanley's attention to the opinion of the Eighth Circuit and that court's statement that Stanley had suggested Suggs was guilty of murder, Stanley's counsel objected on the grounds of relevancy and asked the court to retry the interpretation of the letter. (R30)

The court instructed Suggs' counsel to comply. Suggs' counsel said he did not want to retry interpretations of the evidence. (R30-31) Suggs' counsel advised the court that he would offer the entire record of the defamation lawsuit. (R31-32) The bankruptcy court responded:

> THE COURT: I will not allow you to introduce into evidence document that's volumes long that I will be required to read because it's into evidence. If you have something of that record that's relevant to the question, pull it out, offer it to her to

identify, and let's see if we can get it into evidence. (R32)

After the letter was admitted and read to the court and the witness was questioned about it, the following exchange transpired:

THE COURT: This proceeding, the letter being in evidence is all I'm going to need. The letter is pretty much self-explanatory. It is not -- and it does state the mindset of this witness as of the date it was written, does it not?

MR. NASH: But, your honor, you have to put these things in context, and that's what I'm trying to do, to get her to put it in context with what she's doing, phone calls and a trip up there -- (R38)

* * *

MR. NASH: No. This document is not all together self - explanatory.

THE COURT: We are not going to retry --

MR. NASH: Which is why I wanted to simply show the Eighth Circuit's conclusion that she had suggested murder, and Judge Howard's conclusion at the end of our evidence matter coming with a directed verdict. That was my next point. In other words, not going to retry it, but show what has already been found.

THE COURT: Would you like to know what I think of that letter, just having heard it read?

MR. NASH: Sure. (R39)

THE COURT: I think that the letter indicates she believes foul play was involved in her brother's death.

> MR. NASH: And that Kathleen Suggs did it?
> THE COURT: Yes. (6 seconds dead audio) It's pretty much self-explanatory what the letter says. (R40)

In truth the entire record of the defamation lawsuit was essential to the honesty issue. By rejecting the earlier court record and decision, the bankruptcy court put its own interpretation on this item of evidence and interpreted it to mean that Stanley wrote a letter to homicide detectives because she thought foul play was involved in her brother's death and Suggs did it. But that was clearly the opposite of what was decided by the jury, the U.S. District Court in Arkansas, and the Eighth Circuit Court Of Appeals when considering all of the evidence.

In context, the letter did not show that Stanley thought anyone had been murdered. Neither did Stanley think her brother's death was a result of foul play or that Suggs was responsible. Rather, the letter was part of a mean spirited ploy. Stanley had an ongoing civil suit against the deceased brother's estate and Suggs was named beneficiary in the deceased brother's will. As the record and the opinion of the Eighth Circuit illustrated, Stanley's dishonest accusations were based on spite and malice and an intent to harm Suggs.

Each time Suggs' counsel attempted to "pull out" such an instance from the record of the defamation case, it was retried in much the same fashion by the bankruptcy court.

2) Stanley's false testimony that she had never met with the county coroner at his office nor accused Kathleen Suggs of murder .

Stanley had testified in the defamation case that she had never gone to the county coroner's office or suggested that Suggs was guilty of murder. The county coroner then identified her during the trial in U.S. District Court in Arkansas and repeated from his notes what she had said at his office. (R35) Nevertheless, the bankruptcy court, with questions formed in a leading manner, suggested that she did not meet with the coroner after all:

> THE COURT: Okay. Excuse me. The question was: Do you recall the coroner testifying, and you said you did. Did the coroner during the course of the trial that was held in the state court in Arkansas, did that coroner testify that you met with the coroner?
> THE WITNESS: Yes, sir. He did.
> THE COURT: Okay. And did he testify, did he give a time frame of when that meeting took place?
> THE WITNESS? I believe he gave a day. And on that particular day, I had called him from Shreveport.
> THE COURT. Okay. So he gave a date that he stated he met with you?
> THE WITNESS: Right.
> THE COURT: All right. And it's your testimony today that you did not on that date meet with the coroner but that you called him by telephone?
> THE WITNESS: Yes, sir.

THE COURT: Okay. Proceed.
BY MR. NASH:
Q. You called him by telephone and he said, as well, you met with him, right? Wasn't that his testimony?
A. Well, he said he -- He testified that he recognized me and I did not know who he was. (R35)

Clearly, the bankruptcy court chose to isolate, exclude and disregard the evidence that Stanley had lied under oath when she testified in the defamation case that she did not go to the coroner's office and state her accusations about Suggs to the coroner.

3) Dorothy Stanley's false police report of a burglary in progress.

Stanley knew that Suggs was named as administrator in the deceased brother's will and that she was lawfully on his property while Stanley was still driving to Little Rock. Stanley testified in the defamation suit that she had not made a burglary in progress call during the drive to Little Rock. Telephone records and a policeman's testimony proved that she did. (R109-110) Yet, the bankruptcy court reexamined whether or not the policeman in the defamation case should have been allowed to testify to the call. (R108-118) The bankruptcy court then suggested that Stanley had a completely innocent purpose in making the call:

THE COURT: But you did not want Ms. Suggs to be allowed to go into that house and to remove things from that house before you and your sister got there?
THE WITNESS: That's true. (R118)

THE COURT: So you did not want Ms. Suggs to go into that house?
THE WITNESS: Well, yes. That is fair.
THE COURT: I mean, the concern was that something -- that Ms. Suggs might take something from that home that you and your sister Betty thought you should be entitled to and should be able to see, and maybe whatever it was that Ms. Suggs may take may answer any number of questions that you had as to properties and/or the death of your brother?
THE WITNESS: Yes, sir. (R119)

* * *

BY MR. NASH:
Q. Wasn't there an attorney present with her in the house, Gilbert's attorney?
A. (Inaudible) at the time.
Q. Didn't she tell you Gilbert's attorney says you can fax it?
A. No.
THE COURT: We're not going to retry this lawsuit. I want you to move this along.
MR. NASH: All right.
THE COURT: I'm going to finish this matter today and how much of it I get in depends on you. (R121)

* * *

BY MR. NASH:
Q. You believe you have a right to go into your brother's house and decide, contrary to the law, the courts, the administration, all that sort of thing, what's his or not?
A. I believe we had a right to go in the

house, yes, sir.

Q. Brother who you say had been estranged for a number of years, was angry at you because you wouldn't give him your kidney, you had a right to go just go in there anyway, when she had asked you not to?

A. I did what I thought was best at the time, Mr. Nash. (R122)

Clearly, the bankruptcy court chose to isolate, exclude and disregard the evidence that Stanley had lied under oath when she testified in the defamation case that she did not make the burglary in progress call. Because of her false testimony, Kathleen Suggs had been forced to prove Stanley made the call via Stanley's and her sister's telephone records and testimony from the Little Rock Police Department.

In summary, the record of the defamation trial is incorporated within the decision of the Eighth Circuit in *Suggs v. Stanley and Hendricks*, supra. All of the dishonest conduct within the record was relevant to Stanley's lack of credibility, dishonesty, and determination not to pay and there are more examples than those presented here. The bankruptcy court changed the evidence by forcing each event out of context. Had the bankruptcy court accepted and considered that record, it is doubtful that its review would have consumed more than an hour or two which is in fact much less time than was spent on retrying a few "pull outs" from the defamation case. Most important, nothing would have been taken out of context so the extent of the dishonesty, lack of credibility, malice and continuing determination not to pay could have been seen clearly and accurately.

Reason V. Examples Of Dishonesty And Bad Faith Within The Bankruptcy Proceedings.

Because of the wall erected by the bankruptcy court between pre-filing behavior and behavior during bankruptcy proceedings, the pre-filing history of Dorothy Stanley's false testimony was given no application to the issue of credibility or to similar evidence of bad faith within the bankruptcy case. What follows is a short list of the circumstances indicating bad faith and dishonesty within the bankruptcy proceedings.

1) Stanleys had experience with Chapter 7 from nine years earlier, and were aware that Suggs' judgment may not be dischargeable in Chapter 7. (R130-135)

2) Dorothy Stanley quit her job two weeks after verdict against her which greatly reduced family income. . [Suggs Exb. 8(a) and (b)].

3) Stanleys never made any attempt to pay Suggs' judgment. (R130)

4) Stanleys filed bankruptcy petition and plan same day Suggs' judgment became final and Suggs could have become secured creditor.

5. Discovery was a mockery.

Dorothy Stanley insisted during discovery hearings that no one gave her copies of loan applications and that she had destroyed check registries. Additional discovery of financial information was fruitless. Ten days before trial she

claimed reason she destroyed records was because she put them on a computer. (R192-194) During the week before trial she claimed that the computer crashed. (R195)

6) False testimony regarding loan application which Stanleys made six weeks before filing bankruptcy petition.

During bankruptcy proceedings Suggs was never able to obtain copies of loan applications or check registers from the debtors. While testifying at the bankruptcy trial Dorothy Stanley denied getting a mortgage in February of 2003. (R162) Upon presentation of Creditor's Exhibit #3, a copy of a mortgage filed at the courthouse, she then admitted getting a mortgage on her house during that February, only two months before filing the bankruptcy petition.

She said she went in and made application with a loan officer she had worked with at FDIC. (R165) When shown a copy of the loan application (Suggs Exb. 4) obtained by Suggs' counsel from lender and asked whether it said "No" to outstanding judgments or to ongoing litigation, she said the loan officer did not ask her that. She admitted that he asked her to list creditors and she did not list Suggs by name or Suggs' judgment against her. (R166-168) The bankruptcy court questioned her and pointed out that she obtained a better rate of interest than the old loan on the house. (R169-172) She testified that she did not tell the loan company about bankruptcy because she was not thinking about bankruptcy then. (R172) She denied knowing that it was a federally insured loan. (R176-177)

The bankruptcy court did not voice any view of the loan discrepancies until announcing its decision in the case. At that time, the court disregarded this circumstance entirely by stating that since the loan application was electronic and had not been physically signed and since the Stanleys claimed they had not been asked questions about litigation, judgments, and creditors, etc., that such evidence would be disregarded. The court's statement was as follows:

> THE COURT: Now, the application. I don't like that application. I don't like having to think about that application, because that application has two things in it that says "no" on both. Any judgments? No, after a judgment was rendered. Any litigation? No, after litigation had been going on for approximately two-plus years. There is only one thing about that application. It's not signed. And both witnesses testified they do not recall saying that.
>
> Mr. Nash told you where he got the application from, and he questioned same also. He said it was faxed to him and apparently was faxed to him by Mortgage America. But what was faxed to him was not a signed document, but apparently some sort of printout from the computer program with the information.
>
> Mrs. Stanley indicated that those questions were not asked her and she would not have said that.
>
> Mr. Stanley said, I got there late; I stayed there a grand sum total of maybe 15 minutes.

> They had already started going through everything, but the gentleman, the officer that closed the loan, he did lay the things out, he did give me a summary of those things. But he said, I did not go through those documents. If he had signed that document and if his signature was on what's been brought to this court, his not going through it would just be another nail in his coffin. But what's there, he said, I didn't -- I don't recall giving that information; I don't recall this document. I'm not saying that I didn't have presented to me a document like that; I don't recall. And his signature is not there, nor is Mrs. Stanley's. So if I were to cast a judgment against them based on that, I think I would be reversed. And I think that's wrong. I won't do that. That does cause me concern, though. And I remedied the concern in the manner that I just stated. (R306-307)

Again, the bankruptcy court chose to ignore the evidence that Stanley had lied under oath in her responses to interrogatories about loans and when she initially denied the existence of this mortgage in the courtroom. Furthermore, the bankruptcy court ignored Stanley's admission that she had indeed been asked about creditors but did not list Suggs. Finally, this loan was not made on the Internet. Both of the Stanleys were in the physical presence of the loan officer, a man she admitted she used to work with at FDIC. And this conduct occurred within the bankruptcy proceedings.

7. Debtors were planning bankruptcy at time they secured new loan and did not advise lender.

Dorothy Stanley stated in the courtroom that when she got the noted loan in February of 2003, she had no present intention of filing bankruptcy two months later. Yet, at the first meeting of creditors, Mr. Stanley admitted that they had been thinking about bankruptcy for two years. (R182)

8. The last minute psychology ploy.

Over the objection of Suggs' counsel, the Stanleys were allowed to call Paul Ware during the first 15-20 minutes of Suggs' case. He was a local psychiatrist that had treated the Stanleys' grandson for hyperactivity. Ware testified that he "actually saw Mrs. Stanley myself" two weeks before the trial. (R47) He offered no medical records and had performed no psychological testing of Stanley. (R51)

When asked how often he had testified during the last ten years, he said, "Ten years. Over a thousand." (R52) That is an average of twice a week, every week, for ten years. He said that Stanley was depressed and that she was stressed because she had been caring for her mother at home.(R49, 77, 79-80) He admitted that she was able to work and "once this whole thing is over, she will go on with her life." (R65)

Initially he said that he did not know anything about Dorothy Stanley giving false testimony but if she had, "it certainly would affect my opinion". (R57-58) A few minutes later he said that he knew about her testifying under oath falsely but that, "As I experience her, she is someone who operates more on the feeling level and her feelings get her in

difficulty." (R63) At the time this witness "experienced" Dorothy Stanley and testified that she was stressed because of caring for her mother at home, her mother had already been in a nursing home for more than two years and seven months. (R95)

CONCLUSION

What could possibly be more important and relevant to the credibility of a witness than a history of false testimony in the courtroom in a related proceeding? If the Court of Appeals for the Fifth Circuit had considered the entire record as FRCP 52(a) and (c) requires, including the proffered evidence from the opinion and record of the Eighth Circuit in the underlying litigation, it would have directed the bankruptcy court to consider all of the extensive evidence of the debtors' dishonesty, bad faith, and lack of credibility so that this bankruptcy case could be dismissed, as did the district court.

For the foregoing reasons, the petition for certiorari to the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
FILED
March 29, 2007
Charles R. Fulbruge III
CLERK

No. 06-30343

In the matter of: JAMES HENRY STANLEY AND DOROTHY JEAN WICKER STANLEY

Debtor.

KATHLEEN SUGGS, Appellee-Cross-Appellant
Versus
JAMES HENRY STANLEY AND DOROTHY JEAN WICKER STANLEY, Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana
(No. 5:04cv0059; No. 5:04cv0060)

Before GARWOOD, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM:*
Debtors-Appellants-Cross-Appellees James Henry Stanley and Dorothy Jean Wicker Stanley filed a petition for bankruptcy under Chapter 13 of the United States Bankruptcy Code. Creditor-Appellee-Cross-Appellant Kathleen Suggs an unsecured creditor of the Stanleys, objected to the confirmation of the Chapter 13 plan and moved to convert it to one under Chapter 7, asserting that the Stanley's did not file the petition in good faith, as required by 11 U.S.C. § 1325(a)(3). The bankruptcy

court denied Suggs's motion after finding that the Stanleys had filed the petition in good faith. On appeal, however, the district court reversed, holding that the bankruptcy court clearly erred in finding good faith. The Stanleys appeal, asking us to reinstate the ruling of the bankruptcy court; Suggs cross-appeals, supporting the ruling of the district court but contending that the Stanleys bankruptcy action should be dismissed rather than converted to a Chapter 7 proceeding. We reverse the ruling of the district court, affirm the ruling of the bankruptcy court, and remand for further proceedings in that court.

I. FACTS & PROCEEDINGS

A. The Judgment

Suggs was the long-time companion of Gilbert Wicker, a brother of Dorothy Stanley. In July 1999, Suggs found Wicker dead in his house in Little Rock, Arkansas. After a brief investigation, the Little Rock police department determined that the cause of death was suicide.[1] In the week following Wicker's death, Mrs. Stanley and her sister challenged the determination that the cause of Wicker's death was suicide, suggesting that Suggs may have played a role in his death. As a result, Suggs brought a diversity action against the decedent's sisters in the Eastern District of Arkansas, claiming that they had defamed her. The jury found in favor of Suggs and awarded her $50,000 in damages. The sisters appealed, and the Eighth Circuit affirmed with one dissent.[2]

B. The Bankruptcy Petition and Decision

On April 15, 2003, the same day that the

judgment against Mrs. Stanley became final and before Suggs could file her judgment in the public records and thus become a secured creditor, the Stanleys filed a petition for relief under Chapter 13 of the Bankruptcy Code. The next month, Suggs filed an objection to the proposed wage earners' plan on the grounds that it was a "continuation of the malice of Dorothy Stanley against Kathleen Suggs " Suggs asserted that the plan had not been proposed in good faith, so that confirmation should be denied pursuant to 11 U.S.C. § 1325(a)(3). Suggs also filed a motion to have the Stanleys' Chapter 13 case converted to one under Chapter 7.

Suggs asserted that the Stanleys' lack of good faith was evident from: (1) an earlier filing of a Chapter 7 petition; (2) the timing of the filing of the petition; (3) their attempt to discharge a debt that, according to Suggs, would not be dischargeable in a Chapter 7 bankruptcy, because it arose from a willful or malicious injury; (4) the Stanleys' alleged determination not to pay the debts (5) Mrs. Stanley's voluntarily quitting her job the month following the entry of the judgment in the district court in Arkansas; 6) the original plan's provision for repayment into a retirement account; (1) the Stanleys' failure to comply with Suggs's requests for documents; (8) false or undisclosed information on a loan application filed by the Stanleys two months before the bankruptcy filing; (9) the denuding of the Stanleys' home equity by obtaining a mortgage loan; and (10) the plan's preferential treatment of some of the Stanleys' unsecured creditors over Suggs.

After conducting a hearing the bankruptcy court

confirmed the plan and denied Suggs's motion to convert, finding that the plan had been proposed in good faith. In reaching its conclusion of good faith, the bankruptcy court addressed each of Sugg's proffered indicia of a lack of good faith, rejecting each in turn with reasons. In sum, the bankruptcy court held that the Stanleys filed their petition because "they had no place else they could go and continue to live, pay their bills, and . . . support their dependents." The bankruptcy court entered an order overruling Suggs's objection and denying the motion to convert, which Suggs timely appealed to the district court. Following entry of this order, the bankruptcy court allowed modification of the Stanleys' plan, and Suggs objected to the modified plan for substantially the same reasons that she had objected to the original plan. The modified plan was confirmed on December 2, 2003. Suggs again timely appealed to the district court.

The district court consolidated the appeals, eventually reversing the bankruptcy court. The district court concluded that the bankruptcy court had failed to consider the totality of circumstances and remanded the matter to the bankruptcy court for further proceedings. The Stanleys appeal the district court's ruling. Suggs cross-appeals, asserting that the Stanleys' bankruptcy petition should be dismissed rather than converted to a Chapter 7 proceeding.

II. ANALYSIS

A. Standard of Review

In reviewing cases originating in bankruptcy, "we perform the same function as did the district court: Fact findings of the bankruptcy court are reviewed

under a clearly erroneous standard and issues of law are reviewed de novo.[3] Whether a petition was filed in good faith is a question of fact that we review for clear error.[4] "When a finding of fact is premised on an improper legal standard, or a proper one improperly applied," however, that finding is reviewed de novo.[5]

B. Good Faith

Section 1325(a)(3) of the Bankruptcy Code states that the "court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law.[6] "The good faith standard protects the integrity of the bankruptcy courts and prohibits a debtor's misuse of the process where the overriding motive is to delay creditors without any possible benefit, or to achieve a reprehensible purpose through manipulation of the bankruptcy laws."[7] In proceedings to confirm a plan, the debtor has the burden of proving good faith[8]; in proceedings to convert or dismiss for lack of good faith, the creditor has the burden of showing that the debtor lacks good faith.[9]

To determine whether a Chapter 13 plan was filed in good faith, the bankruptcy court applies a "totality of the circumstances" test.[10] Under this test, the court considers such factors as (1) "the reasonableness of the proposed repayment plan,"[11] 2) "whether the plan shows an attempt to abuse the spirit of the bankruptcy code,"[12] (3) whether the debtor genuinely intends to effectuate the plan, (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities, (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay, (6)

whether the plan reflects the debtor's ability to pay , and (7) whether a creditor has objected to the plan.[13] In applying this test, the bankruptcy court "exacts an examination of all of the facts in order to determine the bona fides of the debtor.[14]

If the bankruptcy court determines that a Chapter 13 plan has not been filed in good faith, it may deny confirmation.[15] Furthermore, at the request of an interested party, the court may convert a Chapter 13 case not filed in good faith to one under Chapter 7 or dismiss the case in its entirety, "whichever is in the best interests of creditors and the estate.[16]

C. Application

Before determining whether the bankruptcy court applied the totality-of-the-circumstances test and, if so, whether the court applied it correctly, we must first identify the standard of review that applies, i.e., de novo or clear error. Suggs insists that, despite the general rule that, being factual, findings of good faith are reviewed for clear error,[17] de novo review should be applied in this instance, because, she contends, the bankruptcy court did not properly apply the totality-of-the-circumstances test. The district court agreed with Suggs, holding that the bankruptcy court had not considered the totality of the circumstances. In so holding, that court concluded that the bankruptcy court had failed to give adequate weight to various indicia of bad faith. Specifically, the district court focused on the timing of the filing of the petition and the possibility that the debt would be non-dischargeable under Chapter 7.

We disagree with the district court's ruling and

conclude that the bankruptcy court applied the totality-of-the-circumstances test and did so properly. The bankruptcy court analyzed each of the most relevant indicia of bad faith, rejecting each in turn for reasons that are not clearly erroneous. It ultimately concluded that

> [t]he indicia that [Suggs's counsel] argues of bad faith, there is a lot of smoke. [Suggs's Counsel was not improper or wrong in pursuing this matter. He did have something to shake and pop on each one of these items. It's just that when you shake and pop and clear the smoke, there's no real fire.

The Stanleys filed their petition, ruled the court, because "they had no place else they could go and continue to live, pay their bills, and . . . support their dependents."

It is true that the bankruptcy court did not explicitly state that it was considering the individual circumstances cumulatively, but the Supreme Court has instructed that a court is not required to make "a formulary statement" that it considered the relevant facts "individually and cumulatively" in applying the totality-of-the-circumstances test.[18] Rather, "[i]t suffices that that was the fair import of the [lower court's] opinion." [19] Here, "the fair import" of the bankruptcy court's analysis is that it considered each indicium and considered them all in toto. We therefore review the bankruptcy court's determination that the Stanleys acted in good faith for clear error. "As long as there are two permissible views of the evidence, we will not find the fact finder's choice between competing views to be clearly erroneous. If the bankruptcy court's account of the

evidence' is plausible in light of the record viewed as a whole, we will not reverse it.[20]

After reviewing the briefs and the record, and hearing oral argument by able counsel for the parties, we conclude that the bankruptcy court's determination that the Stanleys acted in good faith was not clearly erroneous. First, that court's determination that the timing of the petition and the prior bankruptcy filing did not indicate bad faith is plausible. Although these factors are relevant, they are not per se evidence of a lack of good faith, and we cannot say that the bankruptcy court clearly erred in discounting them.

Second, the bankruptcy court did not clearly err in declining to consider whether the Stanleys ' debt to Suggs would be non-dischargeable as a "willful and malicious injury" under Section 523(a) (6) of Chapter 7.[21] Contrary to Suggs's contention, Arkansas law does not appear to require a finding that Mrs. Stanley acted maliciously within our interpretation of Section 523 (a) (6). We have held that the "test for willful and malicious injury under Section 523 (a) (6) . . . is condensed into a single inquiry of whether there exists 'either an objective substantial certainty of harm or a subjective motive to cause harm' on the part of the debtor.[22] In this case, a verdict against Mrs. Stanley could have been supported by a finding that she acted with reckless disregard for the consequences of her act, a finding that would place the actions outside the scope of Section 523(a)(6). More importantly, even if the debt were non-dischargeable under Chapter 7, this is only one of many factors to be considered in the totality of the circumstances. Alone, it does not demand a

finding of a lack of good faith.

Third, the bankruptcy court considered and rejected the remaining asserted signals of bad faith - - for example, Mrs. Stanley's decision to stop working, the discovery disputes, a loan application containing incorrect information, and the Stanleys' stripping of equity from their home - because the court accepted the justifications that the Stanleys offered for these actions during their testimony. These determinations are, after all, based largely on the trial court's credibility calls, to which we (and the district court sitting as an appellate court) owe considerable deference. We decline to call them clearly erroneous and therefore decline to disturb them.

Finally, Suggs's repeated assertion that the Stanleys' motive of spite somehow warrants a finding of bad faith fails. Even if we assume arguendo that the Stanleys did act with spite and malice, this would not mean that they are automatically not entitled to the protection of the Bankruptcy Code: One may be an honest debtor even if his past dealings with his creditor have been dishonest. The debt in Chaffin I and Chaffin II, for example, stemmed from the debtor's conviction for securities fraud and theft.[23]

Inasmuch as "the bankruptcy court's account of the evidence is plausible in light of the record viewed as a whole,[24] we reverse the appellate ruling of the district court and affirm the original good faith ruling of the bankruptcy court.

III. CONCLUSION

The bankruptcy court applied the totality of the

circumstances test and did so properly. Its conclusion that the Stanleys acted in good faith is not clearly erroneous. Accordingly, we REVERSE the appellate ruling of the district court and AFFIRM the rulings of the bankruptcy court that Suggs appealed. As we have concluded that the bankruptcy court's decisions were not error, we deny Suggs's request that the bankruptcy petition be dismissed, and we REMAND this case to the bankruptcy court for further proceedings consistent with its affirmed ruling.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Suggs v. Stanley, 324 F.3d 672, 675-76 (8th Cir. 2003).

2. Id.676-77,682.

3 Nationwide Mut. Ins. Co. v. Berryman Prods. (In re Berryman), 159 F.3d 941, 943 (5th Cir. 1998).

4 In re Elmwood Dev. Co., 964 F.2d 508, 510 (5th Cir. 1992) (chapter 11 petition); see also In re Love, 957 F.2d 1350, 1356 (7th Cir. 1992) (chapter 13 petition). "A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." In re Missionary Baptist Found. of Am., 712 F.2d 206, 209 (5th Cir. 1983)) (internal quotation marks omitted).

5 In re Missionary Baptist Found. of Am., 712 F.2d at 209; see also In re Mercer, 246 F.3d 391, 402 (5th Cir. 2001) ("[T]he clear error standard does not apply to findings of fact resulting from application of an incorrect legal standard.').

6 11 U.S.C. § 1325(aCt3).

7 In re Elmwood Dev. Co., 964 F.2d at 510.

8 See Hardin v. Caldwell, 895 F.2d 1123, 1126 (6th Cir. 1990) (In re Caldwell).

9 See In re Love, 957 F.2d at 1355-56.

10 E.g., In re Chaffin, 816 F.2d 1070, 1073 (5th Cir. 1987) ("Chaffin I"), modified, In re Chaffin, 836 F.2d 215, 216-17 (5th Cir. 1988) ("Chaffin II").

11 Id.

12 Id.

13 Chaffin II, 836 F.2d at 216-17, modifying Chaffin I, 1070.

14 Chaffin I, 816 F.2d at 1074.

15 Section 1325a(3) of the Bankruptcy Code states that "the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3).

16 Section 1307(c)(5) provides that on request of a party in interest . . . and after notice and a hearing, the court may convert a case under . . . [chapter 13] to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including . . . denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan. 11 U.S.C. § 1307(c)(5). Although not explicitly enumerated as a reason for dismissal or conversion, "[m]ost courts have held that lack of good faith can be cause for dismissal or conversion of a chapter 13 plan." 8 COLLIER ON BANKRUPTCY § 1307.04[10] at 1307-21 (15th ed. revised 1996) (collecting cases).

17 In re Elmwood Dev. Co., 964 F.2d at 510; In re Missionary Baptist Found. of Am., 712 F.2d at 209 ("A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.") (internal quotation marks omitted).

18 Early V. Packer, 537 U.S. 3, 9 (2002) (per curiam)

19 Id.

20 In re Acosta, 406 F.3d 367, 372 (5th Cir. 2005) (internal citation omitted)

21 Chapter 7 states that any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is non-dischargeable. 11 U.S.C. Sec. 523 (a) (6).

22 In re Williams, 337 F.3d 504, 509 (5th Cir. 2003).

23 Chaffin I, 816 F.2d at 1071.

24 In re Acosta, 406 F.3d at 372.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
FILED
SEP 10 2007
Charles R. Fulbruge III
CLERK

No. 06-30343

In the Matter of: JAMES HENRY STANLEY AND DOROTHY JEAN WICKER STANLEY

Debtor.

KATHLEEN SUGGS, Appellee-Cross-Appellant
Versus
JAMES HENRY STANLEY AND DOROTHY JEAN WICKER STANLEY, Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Western District of Louisiana
(No. 5:04cv0059; No. 5:04cv0060)

ON PETITION FOR REHEARING EN BANC

Opinion 3/29/07, 5 Cir. _____, _____F.3d _____

Before GARWOOD, WIENER, and CLEMENT, Circuit Judges.

PER CURIAM

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on rehearing En Banc (Fed.R.App.P. and 5th Cir. R. 35), the petition For Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques Loeb Wiener, Jr.
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

KATHLEEN SUGGS CIVIL ACTION NOS.
04-0059 & 04-0060
JUDGE S. MAURICE HICKS, JR

VERSUS MAGISTRATE JUDGE HORNSBY

JAMES HENRY STANLEY AND
DOROTHY JEAN WICKER STANLEY

MEMORANDUM RULING

Before the Court are two appeals, pursuant to 28 U.S.C. § 158(a), filed by Kathleen Suggs ("Suggs") from orders of the United States Bankruptcy Court for the Western District of Louisiana. See Record Document 1 in Civil Action Nos. 044059 & 04-0060. The first order, filed on October 17, 2003, overruled Suggs' objection to the confirmation of James Henry Stanley's and Dorothy Jean Wicker Stanley's ("the Stanleys") Chapter 13 bankruptcy plan and also denied Suggs' motion to convert the Stanleys' Chapter 13 bankruptcy proceeding to a Chapter 7 proceeding. The second order, filed December 2, 2003, granted the confirmation of the Stanleys' modified Chapter 13 plan and again overruled Suggs' objection to the Confirmation. Suggs timely appealed both orders. The appeals were consolidated on April 8, 2004. See Record Document 21 in civil Action No. 04-0059. [1]

Based on the following, the bankruptcy court's order of October 17, 2003, which denied Suggs'

motion to convert the case and overruled her objection to confirmation, and the order of December 2, 2003, which overruled Suggs objection to confirmation and granted confirmation of the Stanleys' Chapter 13 bankruptcy plan, are REVERSED. Accordingly, this matter is REMANDED to the bankruptcy court for further proceedings, specifically on the issue of good faith, consistent with this Memorandum Ruling.

I. BACKGROUND

Suggs brought a defamation action in Arkansas federal court against Dorothy Stanley ("Stanley") and her sister Betty Hendricks ("Hendricks"). Stanley and Hendricks were the sisters of Suggs deceased companion, Gilbert Wicker. The defamation action arose from, inter aria, allegations and statements made by Stanley to the police regarding Suggs' alleged involvement in Gilbert Wicker's death. Suggs also alleged that Hendrix conspired with Stanley in the defamatory acts. The Arkansas federal jury ruled in favor of Suggs, finding that Stanley and Hendricks were liable, as joint tortfeasors, for malicious and intentional acts of defamation against Suggs. The jury awarded Suggs a total of $50,000 in damages ($10,000 compensatory and $30,000 punitive damages against Stanley; $5,000 compensatory and $5,000 punitive damages against Hendricks). Stanley and Hendricks appealed the jury verdict. On March 31, 2003, the United States Court of Appeals for the Eighth Circuit affirmed the jury verdict. See Suggs v. Stanley, 324 F.3d 672 (8th Cir. 2003). The judgment against Stanley and Hendricks became final on April 15,

2003.

Also on April 15,2003, the Stanleys filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code. Suggs was an interested party in the Stanleys' Chapter 13 bankruptcy proceeding, as she held a money judgment against Dorothy Stanley in excess of $50,000 as a result of the aforementioned jury verdict.

On May 30, 2003, Suggs filed an objection to confirmation of the Stanleys' original Chapter 13 bankruptcy plan on the grounds that the plan was a continuation of the malice of Dorothy Stanley against Kathleen Suggs." Record Document 16 at 3. Suggs argued that the Stanleys' plan had not been proposed in good faith and that confirmation should be denied pursuant to 11 U.S.C. § 1325(a)(3) [2] Suggs also filed a motion to convert the Stanleys' Chapter 13 bankruptcy proceeding to a Chapter 7 proceeding on the same grounds. On October 17, 2003, the bankruptcy court held both a confirmation hearing and a hearing on the motion to convert the case. The bankruptcy court ruled that the Stanleys had proposed their Chapter 13 bankruptcy plan in good faith; thus, the bankruptcy court overruled Suggs' objection to confirmation and denied Suggs' motion to convert the Case.[3] Further, the bankruptcy court allowed the Stanleys fifteen days to modify their Chapter 13 plan prior to confirmation.

On November 3, 2003, the Stanleys filed a "Modification of Chapter 13 Plan Before Confirmation." Suggs again objected to the modified plan on the grounds that the Stanleys' modified plan had not been proposed in good faith and that

confirmation should be denied pursuant to 11 U.S.C. § 1325(a)(3). On December 2, 2003, the bankruptcy court overruled Suggs' objection to confirmation and Confirmed the Stanleys' modified Chapter 13 plan.

Suggs timely appealed the bankruptcy court's orders of October 17, 2003 and December 2, 2003. Both appeals are now properly before this Court.

II. LAW AND ANALYSIS

A. Jurisdiction and Standard of Review.

This Court has jurisdiction over Suggs' appeals from the bankruptcy court's orders pursuant to 28 U.S.C. §158(a). In reviewing a decision of the bankruptcy court, this Court functions as an appellate court and applies the standards of review generally applied in a federal court of appeals. See Matter of Webb, 954 F.2d 1102, 1103-04 (5th Cir. 1992). Conclusions of law are reviewed de novo. See Matter of Herby's Foods, Inc., 2 F.3d 128, 131 (5th Cir. 1993). Findings of fact are not to be set aide unless clearly erroneous. See id. at 130-31 "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." Matter of Missionary Baptist Foundation of America, 712 F.2d 206, 209 (5th Cir. 1983).

As applied to the instant matter, "a factual finding that a [bankruptcy petition was not filed [or a plan was not proposed] in good faith is subject to the clearly erroneous standard of review. If this finding is based on an incorrect statement of law, however, [the] review [is] de novo." Matter of Elmwood Dev. Co. v. Gen. Elec. Pension Trust, 964

F.2d 508, 510 (5th Cir. 1992); see also in re Caldwell, 895 F.2d 1123, 1127 (8th Cir. 1990) (stating that "[l]ike the district court, we review the bankruptcy court's determination of good faith for clear error.

B. Issues on Appeal.

In her appellant brief, Suggs presented multiple issues on appeal, most of which revolve around the determination of good faith under 11 U.S.C. § 1325(a)(3). See generally Record Document 16 at 1-3. Simply stated, the crux of Suggs' arguments on appeal is that the bankruptcy court's isolation of various circumstances presented by Suggs [as evidence of bad faith] instead of treating each as a part of an interrelated whole, [is] contrary to the totality of circumstances test as set by the Fifth Circuit." Id. at 5. Specifically, Suggs contends that the bankruptcy court failed to correctly apply the totality of the circumstances standard in considering the Stanleys' good faith and failed to consider the underlying judgment against Dorothy Stanley for defamation as evidence of proven malice. See id.[4] Thus, the main focus of this Memorandum Ruling, just as it is the main focus of Suggs' appeal, is whether the Stanleys proposed their Chapter 13 bankruptcy plan in good faith.

C. Section 1325(a)(3) - Good Faith.

"Section 1325(a)(3) of the Bankruptcy Code provides that 'the court shall confirm a plan if,' in addition to other requirements, 'the plan has been proposed in good faith and not by any means forbidden by law.'" Matter of Chaffin, 816 F.2d 1070, 1073 (5th Cir. 1987) ("Chaffin I"). The term "good

faith" is not defined in the Bankruptcy Code; hence, considerable case law has developed over the meaning of good faith and the test to be in employed for making a good faith determination. The Fifth Circuit has "established a 'totality of the circumstances' test under which we should consider such factors as the reasonableness of the proposed repayment plan and whether the plan shows an attempt to abuse the spirit of the Bankruptcy Code." Id.

The totality of the circumstances test "exacts an examination of all the facts in order to determine the bona fides of the debtor." Id. at 1074. In ascertaining if "a petition was filed with the requisite good faith, the court must examine the facts and circumstances germane to each particular case." Elmwood, 964 F.2d at 510. Simply put, "the good faith inquiry under § 1325(a)(3) requires a careful examination of the totality of the circumstances surrounding the debtor's Chapter 13 filing." Matter of Chaffin, 836 F.2d 215, 217 (5th Cir. 1988) (Chaffin II).

Under section 1325(a)(3), the debtor, i.e., the Stanleys, bears the burden of proof as to the good faith issue. See In re Dicey, 312 B.R.456,458 (Bankr. D.N.H. 2004); see also In re Scotten, 281 B.R.147,149 (Bankr. D.Mass. 2002); In re Padilla, 213 B.R. 349 (9th Cir.BAP 1997). "And when a debtor seeks the Chapter 13 discharge to discharge debt that would remain undischarged in a Chapter 7, that burden is especially heavy." Id. In Chaffin I, the Fifth Circuit specifically discussed good faith in the context of a debt that was not dischargeable under Chapter 13, stating that "[a]lthough the debtor's motive in invoking Chapter 13 solely to obtain discharge of a

previously non-dischargeable debt, as well as the circumstances under which that debt arose, may be factors to consider as part of the totality of the circumstances, they cannot, as a matter of law, suffice to show bad faith." Chaffin I, 816 F.2d at 1074. Further, the Fourth Circuit has acknowledged that while "Chapter 13 exists to allow an individual debtor, who is in financial difficulty, whatever the cause, to develop a repayment plan to serve as a flexible vehicle for debt repayment . . . the good faith requirement acts as a safety valve keeping debtors from the benefits of Chapter 13 who would misuse them." In re Otero, 48 B.R. 704, 707 (Bankr. E.D. Va. 1985). The Fourth Circuit further reasoned that "[a] debtor's pre-petition conduct is no longer insulated from the court's scrutiny and dishonest debtors may no longer seek Chapter 13 protection indiscriminately." Id.

D. Bankruptcy Court's Application of the Totality of the Circumstances Standard.

During the October 17, 2003 hearing, the bankruptcy court acknowledged that Suggs' objection to the Stanleys' Chapter 13 bankruptcy plan was based "primarily on the good faith issue." Transcript of Confirmation and Motion Hearing of October 17, 2003 ("Transcript") at 290. The bankruptcy court also recognized Suggs' objections relating to the Stanleys' disposable income and liquidation analysis; however, the court noted that those issues go along with [the] good faith issue." Id. at 291. The bankruptcy judge saw his task as "mak[ing] sure that . . . Mr. and Mrs. Stanley [came] to this Court with clean hands. Now that does not mean that

their hands cannot have been dirtied before they came to this Court; it just means they have to come into this Court with clean hands. They have come in here in good faith." Id. at 293. Ultimately, the bankruptcy court overruled Suggs' objection to confirmation, reasoning:

> I don't see Mr. and Mrs. Stanley's bankruptcy filed in band faith... the issue before this Court is that they came here to continue with the wrong. They came here because they had not place else they could go and continue to live, pay their bills, and to support their dependents. That's what this Court is for.... The indicia that [Suggs] argues of bad faith, there is a lot of smoke. ... It's just clear that when you ... clear the smoke, there's no real fire. Id. at 312-13.

In making its October 2003 ruling on the good faith issue, the bankruptcy court addressed each of Suggs' arguments as to bad faith individually.[5] Suggs' first argument as to evidence of bad faith was the Stanleys' prior Chapter 7 bankruptcy in 1990. See id. at 293. The bankruptcy court found that the prior bankruptcy should not be considered as evidence of bad faith, as the Stanleys were not "recidivists." Id. Specifically, the bankruptcy court stated that the Stanleys "filed a bankruptcy under Chapter 7 in 1990, they got their discharge, they made their fresh start. They started over. They encountered financial problems again over nine to ten years later. It does not make them in bad faith." Id. at 293-94.

Suggs' second argument relating to bad faith was treated a bit more favorably by the bankruptcy court,

but was ultimately discounted. Suggs argued that the timing of the Stanleys' petition for Chapter 13 bankruptcy was suspect, as the Stanleys filed for bankruptcy on the day that the judgment against Dorothy Stanley became final. [6] See id. at 294. The bankruptcy court noted that this "was a very good argument," as even Dorothy Stanley admitted that she had filed the bankruptcy because she lost the appeal. See id. However, the bankruptcy court ultimately concluded that the timing of the bankruptcy petition did not mean that the Stanleys filed for bankruptcy out of malice. See id. Rather, the bankruptcy court stated, "[Y]es, the bankruptcy was filed because the appeal was not successful, but the bankruptcy was filed because there was no way that they could continue to pay their obligations, survive, provide for their dependents and address a substantial obligation." Id. at 295. [7]

Suggs' also argued that the timing of the Stanleys' home equity mortgage shortly after Dorothy Stanley was deposed for the civil suit in Arkansas federal court was evidence of bad faith. See Transcript at 296; Record Document 16 at 38-39. Again, the bankruptcy court discredited this argument, stating: "Did they do that to strip the equity of their home, to put it beyond the reach of Ms. Suggs? If you're saying they used that money in part to defend a lawsuit that Ms. Suggs had filed against them, you could jump to that conclusion but I won't." Transcript at 297. The bankruptcy judge believed that the Stanleys did not even know they were going to file for bankruptcy at the time of the home equity loan; thus, the home equity loan did not indicate malice. See id. at 305, 306.

Suggs also focused on the fact that the judgment against Dorothy Stanley would not be dischargeable in a Chapter 7 bankruptcy proceeding. See id. at 297. The bankruptcy judge remarked that this was "a good argument if I wasn't a bankruptcy judge." After stating that he had reviewed the most recent Supreme Court and Fifth Circuit case law on the issue, the bankruptcy judge acknowledged that ruling on this issue was "not an easy call." Id. at 298. But, again, the bankruptcy court gave little weight to Suggs' argument on this point, finding that there was a "distinct possibility" that the judgment would be dischargeable in a Chapter 7 proceeding. Id. at 298-99.

Suggs also argued that Dorothy Stanley's decision to quit her job within two weeks of the jury verdict in the Arkansas federal court defamation lawsuit and her failure to seek employment were evidence of bad faith. See Record Document 16 at 22. The bankruptcy court addressed Suggs' "diminished income" argument, but concluded that such argument did not stand up to the explanations given by the Stanieys. Transcript at 303. In making this ruling, the bankruptcy court seemed to give significant credence to the testimony of the Stanleys' witness, psychiatrist Dr. Paul Ware. See id. at 299. Dr. Ware testified that the Stanleys "were very much overburdened with responsibilities." Id. at 299. Further, the bankruptcy court noted that Mrs. Stanley stated that if she was successful in getting her grandson into a children's home, then she would return to work, but not outside of the home, i.e., she would work for her husband's business. See id. at 301-02.

The bankruptcy court also addressed the fact that the Stanleys had "renewed [their] mortgage right before the bankruptcy." Id. at 306. Again, the bankruptcy court gave little weight to this fact as an indicator of bad faith since the Stanleys' purported reason for the refinancing was to reduce the monthly payment and "it did." Id. The bankruptcy court found that the refinancing was not done in contemplation of bankruptcy." Id.

The bankruptcy court also rejected Suggs' "bad faith" arguments pertaining to mortgage applications, financial documents, the Stanleys' retirement plan, and liquidation analysis. Suggs argued that a loan application, which was completed by the Stanleys in February 2003, containing false information was evidence of bad faith. See Record Document 16 at 32. The application asked that all outstanding judgments, pending litigation, and creditors be listed. See id. at 34. The Stanleys allegedly answered "no" to the aforementioned questions. See Transcript at 306. Further, Suggs argued that the Stanleys were attempting to avoid informing the mortgage company that they were considering bankruptcy. See id. at 309. Yet, the bankruptcy court found Suggs' arguments to be unpersuasive because the loan application faxed to Suggs' counsel was unsigned. See id. at 306. Further, the bankruptcy court found that the Stanleys were not misleading the mortgage company because they did not know in February 2003 that they would be filing bankruptcy in April 2003. See id. at 310.

Suggs contends that the Stanleys refusals, denials, and duplicity in failing to provide financial documents is also evidence of bad faith. See Record

Document 16 at 30. The bankruptcy court again discounted this argument and obviously found Dorothy Stanley's testimony that she routinely destroyed tax documents, that she had stopped keeping paper records and had begun storing information on the computer, and that her computer's hard drive failed, to be credible. See Transcript at 307, 308. The bankruptcy judge also stated that he was satisfied as to the Stanleys reasons for not producing other financial documents to Suggs. See id. at 309.

Suggs also argued that the portion of the Stanleys' Chapter 13 plan, under which they were making monthly repayments for a retirement loan and benefiting their retirement plan interests in an amount that was substantially higher than their monthly payments to unsecured creditors, was evidence of bad faith. Record Document 16 at 29. The bankruptcy judge gave no credence to this argument as he "did not see [evidence that the Stanleys had] put large sums of money into the retirement on the eve of bankruptcy" and he also noted that he had sustained the trustee's objection to cut monthly payments toward retirement benefits. Transcript at 312, 314. Further, the bankruptcy court found no evidence that the Stanleys hid any assets in their liquidation analysis. See id. at 313.

Finally, as to Suggs' motion to convert the Stanleys' Chapter 13 bankruptcy proceeding to a Chapter 7 proceeding, the bankruptcy judge stated:

> I am not going to convert Mr. and Mrs. Stanley's Chapter 13 case today.I don't think the grounds that are set forth in the motion,

> which are basically the same grounds that were set forth in the objection, I don't think those grounds are present today for a conversion under 1 1 U.S.C. Section 1307. That does not mean that they might not be present at a later date.

Transcript at 315. Thus, from this statement, it is clear that the bankruptcy court did not reach the "merits" of Suggs' motion to convert; rather, once the bankruptcy court ruled that the Stanleys' plan had been proposed in good faith, it simply denied the motion to convert.

E. Bankruptcy Court's Ruling that the Stanleys Proposed their Chapter 13 Plan in Good Faith was Clearly Erroneous.

As stated by the Fifth Circuit in Elmwood, a factual finding that a bankruptcy plan was not proposed in good faith is subject to the clearly erroneous standard of review. See Elmwood, 964 F.2d at 510. Thus, the bankruptcy court's finding that the Stanleys' Chapter 13 plan was proposed in good faith is subject to the clearly erroneous standard of review. [8]

After reviewing the record and applicable case law, this Court finds that the bankruptcy court's factual finding that the Stanleys proposed their Chapter 13 plan in good faith was clearly erroneous. While there may be evidence in the record to support such a factual determination, this Court is left with a firm and definite conviction that a mistake has been committed due to the bankruptcy court's isolation of each circumstance, as compared to a careful

examination of the totality of the circumstances, surrounding the Stanleys' Chapter 13 bankruptcy plan. See Missionary Baptist Foundation of America, 712 F.2d at 209; Chaffin II, 836 F.2d at 217.

As outlined in section III(D) of this Memorandum Ruling, Suggs presented at least seven "circumstances" as evidence that the Stanleys did not propose their Chapter 13 bankruptcy plan in good faith. Yet, instead of actually considering the totality of these circumstances, the transcript of the October 17, 2003 hearing clearly establishes that the bankruptcy court considered each of these circumstances on its own. Such application of the totality of the circumstances standard prevented the bankruptcy court from truly determining not only the bona fides of the debtors, but also whether the proposed Chapter 13 plan was an attempt to abuse the spirit of the Bankruptcy Code. See generally Chaffin I, 816 F.2d at 1073, 1074. Thus, it is not surprising that the bankruptcy court concluded that each circumstance surrounding the Stanleys' bankruptcy plan considered on its own did not suggest bad faith. Conversely, this Court finds that "a collation of [the] factors [surrounding the Stanleys' proposed Chapter 13 bankruptcy plan], rather than any single datum, controls resolution of [the good faith] issue" and further finds that all of the circumstances surrounding the Stanleys' proposed plan clearly lead to the conclusion that the Stanleys have not met the good faith requirement set forth in section 1325(a)(3).

This Court is particularly concerned with two inter-related circumstances argued by Suggs as evidence of bad faith - the timing of the Stanleys'

bankruptcy petition and the fact that the judgment against Dorothy Stanley is likely not dischargeable in a Chapter 7 bankruptcy proceeding. It is undisputed that the Stanleys filed for bankruptcy relief on the day that the judgment against Dorothy Stanley became final. Even Dorothy Stanley herself admitted that she had filed for bankruptcy because she lost the appeal. While there is no Fifth Circuit case law specifically addressing this precise issue, there is ample persuasive case law on point. Other courts have reasoned:

> Seeking Chapter 13 relief to avoid or lessen the effects of state court litigation is not 'bad faith constituting unfair manipulation of the Bankruptcy Code' per se. Nevertheless, the Debtor's motivation in seeking chapter 13 relief is a factor that must be considered when determining good faith, and where a debtor's behavior exhibits a pattern of manipulation, such conduct should not be rewarded in bankruptcy. (Emphasis added).

In re Banks, 248 B.R. 799, 805 n.2 (8th Cir. BAP 2000); see also In re Zaleski, 216 B.R. 425, 430 (Bankr. D.N.D. 1997) (stating that a debtor's motivation and sincerity in seeking Chapter 13 relief is appropriate for examination). In examining good faith, other courts have also considered whether debtors intended to defeat underlying litigation by filing for bankruptcy. See In re Gress, 257 B.R. 563, 567 (Bankr. D.Mont. 2000). Here, this Court finds that the evidence clearly indicates that the Stanleys, namely Dorothy Stanley, are not honest but unfortunate" debtors that the Bankruptcy Code is

intended to protect. Id. In fact, this Court believes that the timing of the Stanleys' bankruptcy petition, in conjunction with the other "bad faith" circumstances argued by Suggs, clearly suggests an inference of dishonesty to be drawn.

Along those same lines, in Chaffin I, the Fifth Circuit acknowledged that [a]lthough the debtor's motive in invoking Chapter 13 solely to obtain discharge of a previously non-dischargeable debt, as well as the circumstances under which that debt arose, may be factors to consider as part of the totality of the circumstances, they cannot, as a matter of law, suffice to show bad faith." Chaffin I, 816 F.2d at 1074. In Zaleski, the bankruptcy court noted that "although . . . the fact that a debt may be nondischargeable in a Chapter 7 should not be a sole focus of the inquiry nor should it be determination of the issue, the fact that Chapter 13 grants a more liberal discharge (sometimes called a 'super discharge') does cause the court to consider the type of debts being discharged and whether they emanate from pre-petition fraud. Zaleski, 216 B.R. 425, 430 (Bankr. D.N.D. 1997). There is also persuasive case law standing for the principle that "when a debtor seeks the Chapter 13 discharge to discharge debt that would remain undischarged in a Chapter 7, that burden is especially heavy." Dicey, 312 B.R. at 458. Further, the Fourth Circuit has stated that "a debtor's pre-petition conduct is no longer insulated from the court's scrutiny and dishonest debtors may no longer seek Chapter 13 protection indiscriminately." Otero, 48 B.R. at 707. Notwithstanding, this Court is cognizant of the Fifth Circuit's directive that "[d]ebtors proposing some

payment under Chapter 13 are not to be treated more harshly than those opting for a Chapter 7 liquidation." Public Finance Corp. v. Freeman, 712 F.2d 219, 221 (5th Cir. 1983).

The transcript from the October 17, 2003 hearing evidences that the bankruptcy court considered the most recent Supreme Court and Fifth Circuit case law on the issue of whether the judgment against Dorothy Stanley would be dischargeable in a Chapter 7 proceeding.[9] The bankruptcy judge remarked that this was "not an easy call," specifically stating:

> I would have to make a finding, if we were in Chapter 7 and if you file a[n] exception under [section] 523(a)(6), . . . that not only was the letter intentionally written, not only were the phone calls intentionally made, but Mrs. Stanley either knew or was substantially certain to have know that those acts would have caused injury to [Suggs].... I think you would be able to prove that she knew she was writing those letters. She knew that those acts were being taken. She did them intentionally.... But was she certain or substantially [certain] . . . that letter and phone call would cause injury to Suggs]? I don't know the answer to that question today. I may have to, if their Chapter 13 is not successful and the case converts to a 7, I may have to find that out; I may have to go through that record and I may have to allow Ms. Suggs and others to come in and give me testimony. But that's not where we are today. Not dischargeable in

> Chapter 7. And I put a big question mark by that. There is a distinct possibility it would be. It would require trial in any event.

Transcript at 298-99. Based on this reasoning, the bankruptcy court discredited Suggs' argument that the fact that the judgment against Dorothy Stanley would not be dischargeable in a Chapter 7 proceeding was evidence of bad faith.

Conversely, Suggs continues to argue that under 11 U.S.C. § 523(a)(6), the Arkansas federal court judgment against Dorothy Stanley would not be dischargeable in a Chapter 7 proceeding, as it was a "debt for willful and malicious injury by the debtor to another entity or to the property of another entity." See 11 U.S.C. § 523(a)(6). Further, Suggs contends that the bankruptcy court's rejection of the underlying Arkansas federal court judgment was erroneous, as she argued that "the [Arkansas federal court] judgment res judicata, collateral estoppel . . . show[ed] that this issue of malice was decided." [10] Transcript at 242.

Conversely, the Stanleys argued at the October 2003 hearing that because Mr. Stanley was not a party to the Arkansas federal court litigation, res judicata, as stated by Arkansas law, did not apply to this case. See id. at 245. As to Mrs. Stanley, the Stanleys maintained that even though she was a party to the federal court litigation," that [litigation] had nothing to do necessarily with the issues here." Id. Simply put, the Stanleys contend that the record of the Arkansas federal court litigation is not proper "evidence in chief in this case." Id. at 246.

There is no dispute that "judicial proceedings . . .

shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738. Likewise, there is no doubt that the United States Court of Appeals for the Eighth Circuit affirmed the Arkansas federal district court's defamation judgment against Dorothy Stanley, stating "there was sufficient evidence under the requirements of Arkansas law to support the jury findings that [Dorothy Stanley and Betty Hendricks] had defamed [Suggs]." Suggs v. Stanley, 324 F.3d 672, 682 (8th Cir. 2003). The real issue is whether issue preclusion/collateral estoppel"[11] truly applies in this case, as Mr. Stanley was not a party to the Arkansas federal court litigation and the defamation as defined by Arkansas state law may not be synonymous with a willful and malicious injury under Section 523(a)(6) of the Banknjptcy Code. Notwithstanding, this Court finds that the bankruptcy court's failure to even consider the underlying defamation lawsuit in Arkansas federal court was clearly erroneous, as the lawsuit is not only a fact germane to the Stanleys' bankruptcy, but is also one of the totality of the circumstances surrounding the Stanleys' Chapter 13 filing. See Elmwood, 964 F.2d at 510; Chaffin II, 836 F.2d at 217.

Based on the totality of the timing of the bankruptcy petition, the fact that the judgment against Dorothy Stanley may not be dischargeable in a Chapter 7 proceeding, and all of the other arguments advanced by Suggs as evidence of bad

faith, this Court finds that the bankruptcy court's conclusion that the Stanleys met their burden of establishing that their Chapter 13 bankruptcy plan was proposed in good faith was clearly erroneous. Based on the record evidence, this Court is left with the clear impression that the Stanleys proposed Chapter 13 bankruptcy plan may very well have been a continuation of Dorothy Stanley's prior actions against Suggs. See Chaffin II, 836 F.2d at 216 (stating "[i]n cases in which the underlying fraud and a bankruptcy filing are all part of one scheme, or the debtor never intended to repay the debt, the courts have uniformly denied confirmation."). And while Chapter 13 bankruptcy relief is intended to afford honest debtors the opportunity for a fresh start, it is not intended to reward dishonest debtors or to allow debtors to carry out a dishonest scheme.

Accordingly, the bankruptcy court's orders of October 17, 2003 and December 2, 2003 overruling Suggs' objections to confirmation, denying Suggs' motion to convert the case, and granting confirmation of the Stanleys' Chapter 13 plan are REVERSED and this matter is REMANDED to the bankruptcy court for further proceedings, specifically on the issue of good faith, consistent with this Memorandum Ruling.

III. CONCLUSION

For the reasons stated above, the bankruptcy court's order of October 17, 2003, which denied Suggs' motion to convert the case and overruled her objection to confirmation, and the order of December 2, 2003, which overruled Suggs' objection to

confirmation and granted confirmation of the Stanley's Chapter 13 bankruptcy plan, are REVERSED. Accordingly, this matter is REMANDED to the bankruptcy court for further proceedings, specifically on the issue of good faith, consistent with this Memorandum Ruling.

An order consistent with the terms of this Memorandum Ruling shall issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 28th day of December, 2005.

(1) Civil Action No. 044059 was designated as the lead case. Thus, any future reference to a Record Document refers to a document in the record of Civil Action N0. 04-0059.

(2) Section 1325(a)(3) of the Bankruptcy Code states that "the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law."

(3) Suggs' motion to convert the proceeding to a Chapter 7 proceeding was based on 11 U.S.C. § 523(a)(6), which states: A discharge under section 727 ... of this title does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity.

Suggs argued that the Arkansas federal court judgment against Dorothy Stanley was covered by the provisions of section 523(a)(6); thus, such judgment would not be dischargeable in a Chapter 7 proceeding.

(4) Suggs also raised additional issues on appeal that this Court has either discounted or did not reach due to its analysis of good faith. For instance, Suggs appealed the bankruptcy court's treatment of the Stanleys' witness, psychiatrist Dr. Paut Ware. See Record Document 16 at 41. Suggs argued that allowing Dr. Ware to testify prior to the conclusion of Suggs' case in chief created an unfair burden and denied her a fair trial. See id.

As stated above, the key issue on appeal is whether the

Stanleys proposed their bankruptcy plan in good faith. Thus, because this Memorandum Ruling focuses on good faith, this Court did not find it necessary to address the issue of the bankruptcy court's accommodation of Dr. Ware. Notwithstanding, this Court notes that it was within the bankruptcy court's discretion, and it is a common practice within this district, to accommodate a witness such as Dr. Ware.

(5) Section III(D) of this Memorandum Ruling outlines the bankruptcy court's hearing of October 17, 2003, in which the court overruled Suggs' objection to confirmation and denied the motion to convert the case. However, the analysis likewise applies to the bankruptcy court's December 2, 2003 ruling, as Suggs again objected to Confirmation of the Stanleys' modified Chapter 13 plan on the same good faith grounds and the bankruptcy court again overruled her objection.

(6) On March 31, 2003, the United States Court of Appeals for the Eighth Circuit affirmed the jury verdict. See Suggs v. Stanley, 324 F.3d 672 (8th Cir. 2003). Because neither Stanley nor Hendricks filed for rehearing, the judgment became final on April 15, 2003.

(7) In her appeal brief, Suggs further argues that "the timing of the petition goes hand in hand with the [Stanleys'] determination not to pay" the debt to Suggs. Record Document 16 at 21. Suggs contends that this point was brought to the attention of the bankruptcy court, as Dorothy Stanley testified in the October 17, 2003 hearing that she "never made any payment of any kind at all" to Suggs. Transcript at 130. Suggs argues that this admission further solidifies her position that the Stanleys filed their bankruptcy petition on April 15, 2003 "in order to keep Suggs from obtaining any secured status for the debt." Id.

(8) Suggs argues that the bankruptcy court's finding is subject to de novo review because the ruling was based on an incorrect statement of law. see Elmwood, 964 F.2d at 510. This Court disagrees, as there is nothing in the record indicating that the bankruptcy court based its ruling on an incorrect statement of

law. In fact, it appears that the bankruptcy court did base its ruling on the totality of the circumstances standard set forth by the Fifth Circuit. Yet, as set forth more fully in section III(E) of the instant Memorandum Ruling, it is clear that the bankruptcy court incorrectly applied the totality of the circumstances standard in that it isolated the factual circumstances surrounding the Stanleys' Chapter 13 plan rather than considering the totality of the circumstances as a whole. However, in an abundance of caution, this Court is applying the clearly erroneous standard of review, a more stringent standard, in the instant ruling.

(9) The Fifth Circuit held that "the test for willful and malicious injury under Section 523(a)(6) . . . is condensed into a single inquiry of whether there exists 'either an objective substantial certainty of harm or a subjective motive to cause harm' on the part of the debtor.... A debtor must commit an intentional or substantially certain injury in order to be deprived of a discharge. A debt is not excepted from discharge if the debtor has committed a willful or knowing act." In re Williams, 337 F.3d 504, 509 (5th Cir. 2003)

(10) During the October 17, 2003 hearing, the bankruptcy court did not allow Suggs to introduce the entire record of the defamation lawsuit from Arkansas federal court. See Transcript at 31-32. Specifically, the bankruptcy judge stated that he would not allow Suggs Vito introduce into evidence document[s] that [are] volumes long that [he] would be required to read because it's [introduced] into evidence." Id. at 32. Instead, the bankruptcy court allowed Suggs to introduce a letter, written by Dorothy Stanley to the Little Rock Police Department, that questioned the circumstances surrounding Gilbert Wicker's death. See id. at 32-33, 3840. The bankruptcy court further reasoned "that the letter indicates [Dorothy Stanley] believes foul play was involved in her brother's death" and that Suggs was involved in Wicker's death. Id. at 39-40.

(11) In Fisher v. Jones, 311 Ark. 450, 455, 844 S.W.2d 954, 957 (1993), the Arkansas Supreme Gourt stated: Collateral estoppel or issue preclusion, requires four elements before a determination is conclusive in a subsequent proceeding: (1) the

issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment.

FROM THE RULING OF THE BANKRUPTCY COURT AT THE TRIAL ON OCTOBER 17, 2003
COURT'S REFERENCES TO DEFAMATION LAWSUIT

THE COURT:

* * *

Let me say first that the rulings that this Court will make in this bankruptcy for Mr. and Mrs. Stanley are not intended, nor will they in any way diminish or make light of the damages suffered by Ms. Suggs. (R291) The United States district court has already tried that matter before a jury and that matter has already been determined, and an appeal was taken and that Judgment was sustained on appeal. Ms. Suggs suffered damages mental anguish, humiliations et cetera. All of that is set forth in that record and in that judgment. I do not in any way today mean to imply: so what? She did suffer, and I appreciate that. I appreciate every loss that anyone has that comes into this Court. ... I understand how this in effect, as she testified, is a continuation in her mind, of the malice against her and of the injury. I do understand that, and I do not make light of that. But that's not the matter before this Court. The matter before this Court is whether or not Mr. and Mrs. Stanley may avail themselves of the statutory relief of the bankruptcy laws under Chapter 13 of Title 11 of the United States Code. (R292)

There's a number of requirements that must be present far them to do that. They must be able to make regular monthly payments. Usually that's the requirement that most of the persons that come before this Court can't make, can't meet, Mr. and Mrs. Stanley may ultimately not meet that requirement, but they have met that requirement thus far.

There are other requirements. There are requirements about how certain claims have to be treated, priority claims, administrative claims, secured claims, unsecured claims. Again, not to diminish the claim that Ms. Suggs has, it is only in the bankruptcy a general unsecured claim, and as such, in the scheme of distribution, in any bankruptcy, whether it be a Chapter 7, a Chapter 11, a Chapter 12, or a Chapter 13, it's on the bottom rung.

I have to make sure that first Mr. and Mrs. Stanley come to this Court with clean hands. Now that does not mean that their hands cannot have been dirtied before they came to this court; it just means they have to come into this Court with clean hands. They have to come in here in good faith. (R293)

* * *

So, yes, the bankruptcy was filed because the appeal was not successful, but the bankruptcy was filed because there was no way that they could continue to pay their obligations, survive, provide for their dependents and address a substantial obligation, a very substantial obligation. (R295)

* * *

Did they do that to strip the equity out of their

home, to put it beyond the reach of Ms. Suggs? If you're saying they used that money in part to defend a lawsuit that Ms. Suggs had filed against them, you could jump to that conclusion but I won't. They did take the equity out of their home. (R297)

* * *

Not dischargeable in a Chapter 7. That's a good argument if I wasn't a bankruptcy judge, but I am a bankruptcy judge. That's not a call that I can make today. (R297) I have just read through the United States Supreme Court case on that issue, the most recent case of 2003 and I've also read through the most recent Fifth Circuit cases on that issue, And that is not by stretch of the imagination an easy call. I would have to make a finding, if we were in a Chapter 7 and if you file a exception under 523(A)(6), I would have to make a finding that not only was the letter intentionally written, not only were the phone calls intentionally made, but Mrs. Stanley either knew or was substantially certain to have known that those acts would have caused injury to your client. It was either known that they would or substantially certain that they would. That's the Fifth Circuit's language. I think you would be able to prove that she knew she was writing those letters She knew that those acts were being taken. She did them intentionally. She did not negligently write that letter. She intentionally wrote that letter. She intentionally made whatever phone calls it was she made. But was she certain or substantially, should have been substantially certain that those letters and phone calls -- that letter and phone call would cause injury to your client? I don't know the answer to that question today. I may have to, if their

Chapter 13 is not successful and the case converts to a 7, I may have to find that out; I may have to go through that record and I may have to allow Ms. Suggs and others to come in and give me testimony. But that's not where we are today. (R298) Not dischargeable in Chapter 7. And I put a big question mark by that. There is a distinct possibility it would be. I am sure it would require trial in any event.

Diminished income right after judgment. Paul Ware, Dr. Paul Ware, is a very respected physician --

(End of tape no. 11, begin tape no. 12)

THE COURT: -- person and psychiatrist in this community. When he said he had qualified and testified as an expert witness over a thousand times, he was not exaggerating. He has. And his testimony is accepted by every court I know. And his testimony is given significant credence by every court I know. Dr. Ware treats the grandson/adopted son, for attention deficiency disorder, and he has been treating him for a few years. He has also treated Mrs. Stanley for her depression. He is aware of the events that have unfolded and developed in Mr. and Mrs. Stanley's life, perhaps more so in Mrs. Stanley, because he treats Mrs. Stanley. But he told me today that he had heard about everything that he was asked questions as to. He had heard her version of them, but he had heard about all of them. He had heard about the fact that she had been sued, what she had been sued for, the fact that courts made findings that she lied. (R299) He had heard those things from her and he was treating her for depression. He indicated that from his conversations with her, apparently both in treating her and also in treating the grandson/son that she and her husband

Mr. Stanley were very much overburdened with responsibilities. He said she is a caregiver, and what she does is she takes the problems of others and she makes them hers, and she takes them completely. And she has done that with her son and she has done that with her mother. (R300)

You have to understand that type personality. I do understand that type personality. I have it also.

And yes, your sister probably could assist you with your mother, but when you ask and she doesn't, you probably get so mad that you just do what you have to do and move on down and don't think about it. That's what I did. It took me a long time to forgive my brothers, but it wasn't their intention not to help; it was just their inability not to help. And not that they couldn't; they just didn't know how. You unfortunately, know how. And you are called upon regularly to do so. (R300)

I will tell you what I told both my daughters. There are primarily three types of personalities in life. There are variations of the three, but there's primarily three. There's those who go through life screwing up every day. Interesting thing is, nothing gets done without them. They are the risktakers; they are the ones that make things happen. There's those who go through life taking care of people, the risktakers, the people who screw up. And then there is a third category of persons or personalities, and these are the worst of all. (R300) They just watch; they don't get involved at all; they just watch. Life just goes by them; they just watch it. I tell my daughters -- both of them are also caregivers. I tell them: Look, it could be worse, You will always have job security because caregivers are necessary. That's

your plight in life.

Dr. Ware is aware of that. He told me that. He told me that you Just bite off everything, and you take on everything yourself. He told me that it had gotten to the point that what with assisting your husband with his business, your business plural -- taking care of the son, and your husband does also, providing for your mother, trying to do the job at the church, that you couldn't do it all. And you made your choices and the church apparently was not at the top of the list, and some of the church tasks weren't getting done and you couldn't do them. So apparently there was a parting, and it was not agreeable -- I tend to think it was agreeable, but I tend to think also if you hadn't parted when you did, you would have been asked to part. So that's what happened. (R301)

Now, Dr. Ware did say that he thought that once you got these things behind you, if you were successful in getting your son into the Methodists Children's Home in Ruston and being relieved of that obligation and responsibility and get through these things that we are here on, that you should go back to work. (R301)

* * *

Those were the items Mr. Nash argued. I don't see Mr. and Mrs. Stanley's bankruptcy filled in bad faith, and I will state another time in making that ruling, I do not in any way, shape, or form diminish or distract from the wrong they occasioned upon Ms. Suggs before they came here. What those sisters did was wrong. The Court and jury that tried that case found that was wrong. The appellate court found that was wrong. (R313)

That's not the issue before this Court. The issue before this Court is that they came here to continue with the wrong. They came here because they had no place else they could go and continue to live, pay their bills, and to support their dependents. That's what this Court is for. The indicia that Mr. Nash argues of bad faith, there is a lot of smoke. Mr. Nash was not improper or wrong in pursuing this matter. He did have something to shake and pop on each one of these items. It's just that when you shake and pop and clear the smoke, there's no real fire.

I'm not going to sustain the objection that Mr. Nash filed on bad faith filing. That objection for the reasons stated is overruled. (R313)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
Case No. 03-BK-11191-S13

Debtors: James Henry Stanley
Dorothy Jean Wicker Stanley FILED
OCT 17, 2003

ORDER

(x) It is ordered that confirmation of the Chapter 13 Plan is denied.

(x) It is ordered that debtors are granted 15 days from date of this order to file and notice an amended plan...

(x) It is ordered that the motion to convert case to Ch. 7 filed by Kathleen Suggs is hereby denied.

(x) It is ordered that the objection to confirmation filed by trustee is hereby sustained.

(x) It is ordered that the objection to confirmation filed by Kathleen Suggs is overruled.

Date of this order: October 17, 2003.

/s/Stephen Callaway, Judge
U.S. Bankruptcy Court
U.S. Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
Case No. 03-BK-11191-S13

Debtors: James Henry Stanley
Dorothy Jean Wicker Stanley

FILED
DEC 2, 2003

ORDER

(x) It is ordered that confirmation of the Chapter 13 Plan is granted.

(x) It is ordered that the objection to confirmation filed by Kathleen Suggs is overruled.

Date of this order: December 2, 2003.

/s/Stephen Callaway, Judge
U.S. Bankruptcy Court